Court, U.S.
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ALEXANDER L. STEVAS,

No. 82-1812

In The
Supreme Court of the United States
October Term, 1982

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LEROY B. FORTNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

—o—

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED FOR REVIEW

Do state criminal defendants have a constitutional right to fulfillment of personal expectations created during nonplea negotiations with state prosecutors which can be enforced by the remedy of specific performance?

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STATEMENT OF THE CASE

The petitioner had been originally charged in the state courts of Nebraska with three counts of theft in excess of $1,000 which would constitute felonies in Nebraska and carry a penalty of not more than twenty years imprisonment or a $25,000 fine. Neb. Rev. Stat. § 28-105 (Reissue 1979). Prior to the preliminary hearing, the state prosecutors and the defense attorney met and entered into what

they called a "stipulation" which provided that if an offer of settlement were made to the petitioner's former employer in a civil suit arising out of the same set of facts generating these criminal charges, the prosecution agreed to reduce the charges against the petitioner to a single misdemeanor count and recommend a minimum fine plus costs if the offer were accepted and a fine if it were not.

The preliminary hearing was continued and a period of time elapsed evidently to permit the civil negotiations to proceed. During the interim, a new prosecutor was appointed to handle the case and the new prosecutor declined to be bound by the previous understanding. The petitioner initially proceeded civilly in mandamus to compel the new prosecutor to comply with this understanding and the state district court declined this relief and an appeal was taken to the Nebraska Supreme Court which affirmed the state district court's denial of the mandamus. *State ex rel. Fortner v. Urbom,* 211 Neb. 309, 318 N. W. 2d 286 (1982).

A trial on the criminal charges was ultimately conducted without a jury on stipulated facts and the petitioner was found guilty of one felony count and sentenced to four to ten years in the Nebraska Penal and Correctional Complex and to a fine of $10,000. This conviction was appealed to the Nebraska Supreme Court and was ultimately summarily affirmed without oral argument. *State v. Fortner,* Supreme Court No. 82-592.

A petition for writ of certiorari was taken to this court thereafter.

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SUMMARY OF ARGUMENT

I.

Personal expectations created in the mind of a defendant as the result of pretrial negotiations with state prosecutors are not afforded protection by the United States Constitution.

II.

A defendant does not have a constitutional right to engage in pretrial bargaining with state prosecutors.

III.

Specific performance is not an available remedy to enforce the provisions of nonplea pretrial agreements between defendants and state prosecutors.

IV.

Absent some detrimental reliance of a criminal rather than civil nature, a state may withdraw from any pretrial agreement prior to entry by the defendant of a plea of guilty.

V.

This court's holding in *Santobello v. New York,* 404 U.S. 257 (1971) is only applicable to breaches by state prosecutors of pretrial agreements involving the actual entry by the defendant of a plea of guilty.

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ARGUMENT

I.

The petitioner is not entitled to have the provisions of the pretrial agreement specifically performed and his petition for Writ of Certiorari should therefore not be granted.

The leading decision of this court on questions of the enforceability of pretrial plea bargains between defendants and prosecutors is *Santobello v. New York,* 404 U. S. 257 (1971). At the outset, the respondent suggests that the factual differences between *Santobello, supra,* and the case at bar should be clearly stated.

Santobello, supra, concerned a breach of a bargain in which the defendant agreed to plead guilty and actually did so in reliance on the agreement. In the case at bar, no part of the agreement concerned a plea of guilty and the petitioner did not in fact enter any such plea.[1]

Additionally, here the petitioner's "consideration" for the prosecutor's promise to reduce the charges was the making of an offer to settle a civil suit arising out of the same facts giving rise to the criminal charges. While it is true the petitioner made the offer as agreed, the offer had not been accepted at the time the substitute prosecutor reneged and was in fact never accepted, thereby raising questions of the "detriment" incurred by the petitioner.

While the decision of the court in *Santobello, supra,* is instructive in factual situations involving a breach by the

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[1]The case ultimately was, however submitted to the court without a jury on stipulated facts.

prosecutor of a pretrial plea bargain where the petitioner has in fact, in reliance upon this bargain, plead guilty, the respondent suggests that the decisions of the Fourth Circuit Court of Appeals in *United States v. Bethea,* 483 F. 2d 1024 (4th Cir. 1973) and the Third Circuit Court of Appeals in *Government v. Scotland,* 614 F. 2d 360 (3rd Cir. 1980) are more applicable to the facts presented here. In *Bethea, supra,* the defendant's obligation under the pretrial agreement was to seek military induction. In spite of the fact that the defendant kept his part of the bargain, the prosecutor in *Bethea, supra,* reneged and the defendant attempted to enforce the promise based upon this court's decision in *Santobello, supra.* There the Fourth Circuit held that this court's ruling in *Santobello* only applied where the defendant had in fact plead guilty in reliance upon a promise. It is true that the Fourth Circuit six years later without mentioning its decision in *Bethea, supra,* appeared to hold to the contrary in *Cooper v. United States,* 594 F. 2d 12 (4th Cir. 1979). Respondent suggests that the cases may not in fact be inconsistent when it is considered that in *Bethea* the agreement did not involve the entry by the defendant of an actual plea of guilty whereas in *Cooper, supra,* the defendant had in fact plead guilty in reliance upon the prosecutor's promise.

While *Government v. Scotland, supra,* concerned facts involving a plea of guilty the Third Circuit there specifically rejected the Fourth Circuit's analysis and holding in *Cooper, supra.*[2]

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[2]However, see contra *Palermo v. Wardin,* 545 F. 2d 286 (2nd Cir. 1976).

While it is apparent that there is a lack of uniformity in how the state courts and circuit courts of appeal have interpreted the breadth of this court's holding in *Santobello, supra,* the majority of the courts have concluded that absent some detrimental criminal reliance by a defendant upon a promise made by a prosecutor, that prosecutor may withdraw from any plea agreement prior to the time the defendant actually enters a plea of guilty. *State v. Wheeler,* 631 P. 2d 376 (1981); *State v. Collins,* 265 S. E. 2d 172 (1980); *State v. Edwards,* 279 N. W. 2d 9 (1979); *People v. Heiler,* 262 N. W. 2d 890 (1977); *Government v. Scotland, supra.*

Much of the confusion arising out of this court's holding in *Santobello, supra,* apparently is caused by the direction by this court to the New York state courts to determine whether or not the relief of recision or the relief of specific performance would be more appropriate.[3]

It is clear that a defendant in a state criminal trial does not have a constitutional right to engage in pretrial bargaining with a state prosecutor. *Weatherford v. Bursey,* 429 U. S. 545 (1977); *United States v. Rankin,* 572 F. 2d 503, *cert. denied,* 439 U. S. 979. The respondent suggests that personal expectations created in the mind of a defendant as a result of pretrial negotiations with the state prosecutor are not afforded protection by the United States Constitution.

Agreements between prosecutors and defendants come under constitutional scrutiny where a defendant has relied

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[3]For a complete analysis, see Westen and Westen, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal. L. Rev. 471 (1978).

to his detriment upon the promise by pleading guilty and where thereafter the prosecutor has failed to fulfill his portion of the bargain. In such cases it is suggested by the respondent that the appropriate remedy is one of recision and placing the defendant back into a position where he was prior to the agreement and not the equitable remedy of permitting the defendant to require the prosecutor to specifically perform as promised.

The respondent would suggest this is especially true where as here there was no criminal detrimental reliance such as the entering of a plea of guilty. The only detriment suffered by the petitioner in the case at bar was the making of an offer in a civil settlement which was never in fact accepted, and it is suggested that in such cases this court's holding in *Santobello, supra,* is not applicable, and that the prosecutor is permitted to renege upon the promise and the relief afforded the petitioner is the retention of his right to stand trial and require the prosecutor to prove his guilt beyond a reasonable doubt.

The respondent would conclude that this court's holding in *Santobello, supra,* applies only to those situations where there has been a breach by the state prosecutor of a pretrial agreement involving the actual entry by the defendant of a plea of guilty and that personal expectations created in the minds of defendants in pretrial negotiations are not protected by the United States Constitution and therefore specific performance such as is sought here is an inappropriate equitable remedy there being a complete and adequate remedy at law where such breaches have occurred.

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CONCLUSION

The respondent would conclude that the clear weight of authority is that a prosecutor may withdraw from any pretrial agreement at any time prior to the time a defendant has detrimentally relied upon that agreement by pleading guilty, and that where as here the reliance if detrimental was purely civil in nature and defendant, upon the breach of that understanding, is not entitled to have the provisions of that agreement specifically performed thereby vacating, as would be the case here, an otherwise constitutionally valid conviction.

Respectfully submitted,

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